1890.

UPREME COURT OF THE UNITED STATES.

No. 111.

JAMES ADAMS, PLAINTIFF IN ERROR,

vs.

PHILIP OTTERBACK.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE DISTRICT OF COLUMBIA, HOLDEN IN AND FOR THE COUNTY OF WASHINGTON.

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[GIDEON, print.]

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the judges of the circuit court of the District of Columbia, sitting for the county of Washington, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, between James Adams, plaintiff, and Philip Otterback, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in said Supreme Court to be then and there held; and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right, and according to the laws and custom of the United States, should be done.

Witness the honorable R. B. Taney, chief justice of said Supreme Court. Issued this 4th day of October, 1852.

JNO. A. SMITH, *Clerk*.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to Philip Otterback, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the District of Columbia, for the county of Washington, wherein James Adams is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said James Adams, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the honorable W. Cranch, chief judge of the circuit court of the District of Columbia, this 4th day of October, 1852.

Service acknowledged.

JOS. H. BRADLEY,
Defendant's att'y.

October 4, 1852.

Circuit court of the District of Columbia, for Washington county, October term, 1851.

JAMES ADAMS
vs.
PHILIP OTTERBACK.

Be it remembered, that, on the thirty-first day of October, eighteen hundred and fifty-one, judgment by the said court was rendered against the plaintiff in the above cause, as appears from the minutes of proceedings of said court.

Whereupon the said plaintiff, by Johnson Hellen, esq., his attorney, filed in court here the following petition, which appears to have been addressed to the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, in the words, and of the tenor following, to wit:

Petition to Hon. R. B. Taney.

To the honorable Roger B. Taney, chief justice of the Supreme Court of the United States.

The undersigned petitioner, James Adams, instituted a suit in the circuit court of the District of Columbia, and county of Washington, against Philip Otterback, on a note that had been drawn by Haw, Yellott & Co., on the 11th of March, 1848, for the sum of $800, and made payable to the order of said Otterback, at sixty days after date.

This note was discounted by the Bank of Washington, and the proceeds were paid to Otterback's check by the said bank, and the note, after it had been protested for non-payment by the drawers, and notice thereof had been given to the endorser, was assigned to your petitioner. On the trial of the case it was proved by the plaintiff that the note fell due on a Sunday, and that payment had been demanded of the drawers, at their place of business, on Monday, the 15th day of May, 1848, (Sunday being the 14th,) and that notice of non-payment of the note by the drawers was given to the said Otterback, the endorser, on the same day.

The undersigned, the plaintiff in the above suit, also gave evidence by the teller and book-keeper of the Bank of Washington, that a custom had prevailed in the said bank, for a period of nearly two years prior to the making of the note in suit, that where notes, which had been discounted by the bank, became due on a Sunday, demand of payment on the drawers, and notice of non-payment to the endorsers, were made and given on the following Monday. Notwithstanding the custom of the bank was thus clearly established, and the demand on the drawers, and notice of non-payment to the endorsers, had been made and given in strict conformity with the custom of the bank, yet the circuit court decided that due diligence had not been used, and that your petitioner could not recover.

The drawers of the note are believed to be insolvent, and as the endorser had the benefit of the discount, as his check will show, he ought to be coerced to pay the note, if the law will justify a recovery from him. The case, too, involves a question of great importance to the Bank of Washington, and may seriously affect its paper if the decision of the circuit court shall be considered as a correct exposition of the law.

At the trial of this suit the principal and interest, when the judgment was entered, amounted to about $960, and wanting about $40 of the sum requisite to authorize an appeal or writ of error to the Supreme Court. The undersigned is therefore induced to solicit of your honor the granting a certificate to have the case taken to the Supreme Court, as provided for by the act of Congress, of 2d April, 1816.

The undersigned herewith submits to your honor a certified copy of the record of the proceedings in the circuit court, which exhibits a full statement of the evidence introduced on the trial in that court. The un[der]signed has been advised by his counsel that the Supreme Court have heretofore decided, in the case of Renner vs. the Bank of Columbia, 9th Wheaton, 582; Mills vs. Bank of the United States, 11th Wheaton, 430; Bank of Washington vs. Triplett & Neale, 1st Peters, 25, that the banks have a right to establish a usage to regulate their business, and that all persons who deal with such banks are bound to take notice of it, without regard to the form of the note, as was the case in Triplett & Neale. This right has been reaffirmed in the case of Cookendorfer against Preston, 4th Howard, 317, where the right to change or modify any usage is expressly recognised. The circuit court decided that the bank had no right to do so.

Believing that this case involves a question of great importance, and being desirous of having it fully adjusted by the highest court in the country, the undersigned respectfully invokes the aid of your honor to grant him the power to remove the cause to the Supreme Court, so that it may be determined whether due diligence had not been used in this case, and he, as in duty bound, will ever pray.

JAS. ADAMS.

Washington, Feb'y 18, 1852.

Upon the back of the aforegoing petition was the following endorsement, to wit:

Order for writ of error to issue.

To John A. Smith, clerk of the circuit court of the District of Columbia, for the county of Washington.

Ordered, That a writ of error be issued in the within mentioned case, the bond to be approved, and the citation issued and served, as in cases where the matter in dispute is of the value of one thousand dollars, exclusive of costs.

R. B. TANEY,
Chief justice of the S. C. of the U. S.

Whereupon, in virtue of the above order, the writ of error issued as prayed, with a citation directed to the said Phillip Otterback; and the said James Adams having given bond as required by law, the following transcript of the record of proceedings in the said cause is accordingly transmitted to the Supreme Court of the United States.

Appeal bond.

Know all men by these presents, that we, James Adams and William Gunton, are held and firmly bound unto Philip Otterback in the just and full sum of two hundred dollars lawful money, to be paid to the said Philip Otterback, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this fourth day of October, eighteen hundred and fifty-two.

Whereas lately, at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit depending in the said court, wherein the said James Adams was plaintiff, and the said Philip Otterback was defendant, judgment was rendered against the said plaintiff, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation to the said Philip Otterback to be and appear at a Supreme Court of the United States on the first Monday in December next.

Now, the condition of the above obligation is such, that if the said James Adams shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to [be] null and void, otherwise to be and remain in full force and virtue.

JAS. ADAMS, [L. S.]
WM. GUNTON. [L. S.]

Signed, sealed, and delivered, in presence of—
S. B. BOWMAN.

Approved: W. CRANCH.

Style of court.

DISTRICT OF COLUMBIA, *ss.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, on the third Monday of October, being the twentieth day of the same month, in the year of our Lord one thousand eight hundred and fifty-one—

Present, William Cranch, chief judge; the honorable James S. Morsell [and] James Dunlop, asst. judges; Richard Wallach, esq., marshal; John A. Smith, clerk.

In the records of proceedings of the same court, amongst others, are the following, to wit:

Parties.

JAMES ADAMS
vs.
PHILIP OTTERBACK.

Be it remembered, that heretofore, to wit, on the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and fifty, the said James Adams, by Johnson Hellen, esq., his attorney, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the district aforesaid, in the words, and of the tenor following, to wit:

Capias.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to the marshal of the District of Columbia, greeting:

We command you that you take Philip Otterback, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held, in and for the county aforesaid, at the city of Washington, on the third Monday of October next, to answer unto James Adams in a plea of trespass on the case, and so forth.

Hereof fail not at your peril, and have you then and there this writ.

Witness William Cranch, esq., chief judge of our said court, at the city of Washington, the 27th day of March, one thousand eight hundred and fifty.

Issued the 28th day of March, 1850.

(Hellen.) JNO. A. SMITH, *Clerk.*

Return of capias.

At which said third Monday of October, being the day of the return of the aforegoing writ, comes into the circuit court here the said plaintiff, by his attorney aforesaid, and the marshal of the district aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit: "Cepi."

"R. WALLACH, *Marshal.*"

Appearance of defendant.—Rule nar.—Imparlance.

And the said Philip Otterback being called appears in court here, by Joseph H. Bradley, esq., his attorney; and thereupon the said defendant, by his said attorney, prays that the said plaintiff *declares that the said plaintiff* may declare against the said defendant in the plea aforesaid. Whereupon it is ruled by the court here, that the said plaintiff declare against the said defendant in the plea aforesaid, or judgment will be rendered against him in default thereof; and the said plaintiff, by his attorney aforesaid, prays leave of the court here to imparle until

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the fourth Monday of March next, and then to declare against the said defendant in the plea aforesaid, and he hath it; the same day is given to the said defendant, then, &c.

March term, 1851.

At which said fourth Monday of March, in the year one thousand eight hundred and fifty-one, until which said day the said plaintiff had leave to imparle, and then to declare against the said defendant in the plea aforesaid, comes again into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his said attorney; and the said plaintiff, by his attorney aforesaid, declares against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA,
Washington county, to wit:

Philip Otterback, late of Washington county, merchant, was attached to answer unto James Adams in a plea of trespass on the case, and so forth.

And whereupon the said plaintiff, by Johnson Hellen, his attorney, complains, that whereas, heretofore, to wit, on the eleventh day of March, in the year of our Lord eighteen hundred and forty-eight, one George W. Yellott, Henry Haw, and William B. Scott, in the name of Haw, Yellott & Company, made their certain note in writing, commonly called a promissory note, bearing date the year aforesaid, and thereby, sixty days after the date thereof, promised to pay to the said defendant, by the name of Philip Otterback, esq., or order, the full and just sum of eight hundred dollars, current money of the United States, for value received, and then and there delivered the said note to the said defendant; and the said defendant to whom, or to whose order the payment of the said sum of money in the said note mentioned was to be made, afterwards, and before the payment thereof, and before the time limited in the said note for the payment thereof, to wit, on the day and year aforesaid, at the county aforesaid, endorsed the said note, and thereby ordered and appointed the said sum of money, in the said note mentioned, to be paid to the said plaintiff, and then and there delivered the said note so endorsed to the said plaintiff.

And the said plaintiff avers, that afterwards, and after the expiration of the said time limited in the said note for the payment thereof, to wit, on the fifteenth day of May, in the year eighteen hundred and forty-eight aforesaid, he showed and presented the said note, with the endorsement so made thereon as aforesaid, at the United States hotel in Washington city, and then and there required the said George Yellot, Henry Haw, and William *C.* Scott, to pay the same; but the said Yellot, Haw, or Scott, did not then, or at any time since, pay the same, or any part thereof, to the said plaintiff, but then and there wholly refused so to do; of all which premises the said defendant afterwards, to wit, on the day and year aforesaid, at the county aforesaid, had notice.

By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiff, according to the tenor and effect of the same, and the said endorsement thereon; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff, according to the tenor and effect thereof and the endorsement thereon, whenever afterwards he should be thereto requested.

And whereas the said defendant afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, was indebted unto the said plaintiff in another sum of eight hundred dollars, like money, for the like sum of money by the said plaintiff, to and for the use of the said defendant before that time paid, laid out, and expended, at the special instance and request of the said defendant; and for other money by the said plaintiff before that time lent and advanced to the said defendant, at his special instance and request; and for other money by the said defendant before that time had and received to the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, undertook and promised the said plaintiff to pay him the said last mentioned sum of money, when afterwards he should be thereunto required.

Yet the said defendant the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the same day and year last aforesaid, at the county aforesaid, and often afterwards,) has not paid, but the same or any part thereof to pay hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff in the sum of two thousand dollars, and therefore he brings suit, and so forth.

J. HELLEN,
For the plaintiff.

JOHN DOE and RICHARD ROE, pledges, &c.

Rule plea.

And thereupon the said plaintiff, by his attorney aforesaid, prays that the said defendant may answer to the declaration aforesaid of him the said plaintiff, in the plea aforesaid. Whereupon it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be entered against him in default thereof.

Plea of non-assumpsit.—Issue joined.—Venire facias.

And the said defendant, by his attorney aforesaid, defends the wrong and injury, when, and so forth, and says, that he did not assume upon himself, in manner and form as the aforesaid plaintiff above against him hath complained, and of this he puts himself upon the country. And the said plaintiff, by his attorney aforesaid, in like manner, and so

forth; therefore let a jury thereon appear before the court here, on the third Monday of October next, by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.; the same day is given to the said parties, then and there, &c.

October term, 1851.—*Jury empannelled.*

And now, at this day, to wit, the said third Monday of October, in the year eighteen hundred and fifty-one, comes again into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid; whereupon, for trying the issue aforesaid, it is ordered by the court here, that twelve persons from the pannel of petit jurors, returned to the court here by the marshal of the district aforesaid, be drawn by ballot; and thereupon the twelve persons so drawn being called, come, to wit:

Jurors' names.

1. William Galligan,
2. Joseph Shillington,
3. Joseph Hedrick,
4. John T. Ryon,
5. James B. Tate,
6. Leonard Storm,
7. Benjamin S. Myers,
8. William Wilson,
9. Thomas Parker,
10. George Crandell,
11. Willard Drake
12. John McDevitt.

Verdict.—Judgment.

Who being empannelled and sworn, upon their oath do say, that the said Philip Otterback did not assume upon himself, and promise, in manner and form as the said James Adams above against him hath complained, and as the said Philip Otterback above by pleading hath alleged. Therefore, it is considered by the court here that the said James Adams take nothing by his writ and declaration aforesaid, but that he be in mercy for his false clamor thereupon, and that the said Philip Otterback go thereof without, &c. It is also considered by the court here, that the said Philip Otterback recover against the said James Adams the sum of seventeen dollars and forty-three [cents,] now here adjudged unto him for his costs and charges by him about his defence in that behalf laid out and expended; and that the said Philip Otterback have thereof execution, &c.

Test: JNO. A. SMITH, *Clerk.*

Mem.

Memorandum. Before the jurors aforesaid withdrew from the bar of the court here, the plaintiff, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit:

Defendant's bill of exceptions.

JAMES ADAMS
vs.
PHILIP OTTERBACK.

On the trial of this cause the plaintiff, to maintain the issue on his part joined, gave in evidence, without objection, the promissory note in his declaration mentioned, viz:

Note.

$800. WASHINGTON, *March* 11, 1848.

Sixty days after date, we promise to pay to the order of Philip Otterback, esq., eight hundred dollars, value received.

HAW, YELLOT & CO.

Endorsed—"PHILIP OTTERBACK."

The handwriting of the makers and endorser being admitted, and then by H. B. Sweeny, teller of the Bank of Washington, gave evidence to show that the said note was discounted on the eleventh day of March, 1848, by the Bank of Washington, in the city of Washington, to the credit of the defendant, and the proceeds thereof paid on the same day to the defendant's check.

Check.

$791 60. WASHINGTON, *March* 11, 1848.

Bank of Washington, pay to bearer the proceeds of Haw, Yellott & Co.'s note discounted this day, ($800) eight hundred dollars.

PHILIP OTTERBACK.

That the said note was unpaid at maturity, and on Monday, the 15th day of May, after three o'clock of that day, was delivered by the said bank to George Sweeny, the notary employed by said bank to demand payment thereof, and for protest if not paid; and then produced and read, without objection, the entry of said notary, made in his notarial record as follows:

Monday, May 15, 1848.

$800. WASHINGTON, *March* 11, 1848.

Sixty days after date, we promise to pay to the order of Philip Otterback, esq., eight hundred dollars, for value received.

(Signed) HAW, YELLOTT & CO.

Endorsed—PHILIP OTTERBACK.

Demanded payment at the United States hotel. I was answered, "neither of the proprietors are within, and it cannot be paid." Notice for endorser delivered at his dwelling the same day discounted.

And then, by the same witness, further gave evidence to show that he has been the teller of said bank since the year 1836; that, after the

decision of the case of Cookendorfer against Preston, by the Supreme Court in 1836, the said bank changed the usage and custom which had theretofore prevailed therein, in regard to the demand and protest of negotiable paper held and discounted by it; and in all cases of discount, they theretofore held the paper until the fourth day of grace; and if the said fourth day fell on Sunday, it was, under the said change, the custom of said bank to retain them until Monday, and on that day to deliver the same to the notary to demand payment and give notice; and by Sylvester B. Bowman, book-keeper of said bank, that since the decision of said case of Cookendorfer and Preston, the said usage and custom had been changed by said bank as stated in said Sweeny's evidence; and rested.

And the said witness, Sweeny, on being cross examined, stated that no notice, public or otherwise, had, so far as he knew, ever been given by said bank of the said change of said usage and custom; and upon being asked how many instances there had been in said bank prior to the said note now in suit, in which a note not payable in said bank had been discounted by it, the last and third day of grace of which had come on Saturday, and it had been retained until Monday, and he replied he did not know, and could only tell by reference to said notarial register; and, on examining said register, he stated he could find but three cases, to wit, one on 7th February, one 10th April, and one 8th May, 1848, and, on further examination, he found such a note falling due 26th July, 1847, and made payable at Corcoran & Riggs's; and said Bowman, on his cross examination, said he could state no more than Mr. Sweeny had.

And thereupon defendant offered to give evidence to show that the common usage and custom of the banks (except the Bank of Washington) and bankers in said District, had been, for more than thirty years past, and now is, in all cases of negotiable paper discounted by them respectively, and not made payable at the place of business of such bank or bankers, to demand payment thereof on the third day of grace, and gave notice according to the commercial usage governing such paper; but the plaintiff objects to the admissibility of such offered evidence, and the court sustains said objection, and refuses to permit the same to be given; and the defendant, by his counsel, excepts thereto, and prays the court to sign and seal this his bill of exceptions, and to cause the same to be enrolled according to the statute, which is done this 3d.

JAMES S. MORSELL, [L. S.]
JAMES DUNLOP. [L. S.]

Plaintiff's exception.

And thereupon the defendant prayed the court to instruct the jury, that if the jury shall find the whole evidence aforesaid to be true, yet the plaintiff has not thereby shown that he has used due diligence in demanding payment, and giving notice of the non-payment of said